Filed 12/30/08 In re E.G. CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re E.G., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. E.G., Defendant and Appellant.	D051418 (Super. Ct. No. J208405)
In re E.G., a Minor, on Habeas Corpus.	D052271

APPEAL from an order of the Superior Court of San Diego County, Amalia L. Meza, Judge, considered with a petition for habeas corpus. Order affirmed. Petition denied.

E.G. was adjudged a ward of the juvenile court after admitting allegations he committed vandalism. Thereafter, the juvenile court conducted hearings in E.G.'s

absence in which it ordered him to pay $791.61 in restitution jointly and severally with his parents. On appeal, E.G. contends he was entitled to a hearing on the amount of victim restitution under Welfare and Institutions Code section 730.6 and was denied his state and federal due process rights when the contested hearing took place in his absence. E.G. also contends the juvenile court's imposition of a restitution order in excess of $400, the amount of damage he assertedly admitted causing, violated the principles of *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) and *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*). E.G. has filed a petition for writ of habeas corpus repeating these allegations, and asserting his counsel provided constitutionally ineffective representation.

Though we agree E.G. had statutory and constitutional due process rights to be present at his restitution hearing and the juvenile court erred by proceeding in his absence without finding he effectively waived his presence, we conclude the error was harmless beyond a reasonable doubt. We deny E.G.'s petition for writ of habeas corpus.

FACTUAL AND PROCEDURAL BACKGROUND

In November 2006, E.G., a minor, admitted allegations that he had unlawfully and maliciously damaged a truck belonging to Ron Lucero causing more than $400 in damage in violation of Penal Code section section 594, subdivision (a)(b)(1). At a disposition hearing, the juvenile court declared E.G. a minor under Welfare and Institutions Code section 602 and placed him in the care and custody of the probation department, which was to determine E.G.'s placement in a suitable residential facility. Thereafter, the probation department applied for an order that E.G. pay victim restitution

in the amount of $791.61, which was the amount reflected in a preliminary repair estimate attached to the request.

The restitution hearing took place in June 2006. E.G.'s counsel and his parents were present but E.G. was not, his counsel explaining to the court that he was in a residential treatment facility. Lucero was sworn and subjected to direct and cross-examination about the offense, the resulting damage, and the fact he was out of pocket $791.61 for the repairs to his truck. E.G.'s parents, via E.G.'s counsel, objected to the repair amount as excessive. Afterwards, the court ordered E.G. and his parents to jointly and severally pay restitution to Lucero in the requested amount. E.G. filed this appeal.

DISCUSSION

I. *Due Process*

Maintaining he had both statutory and state and federal constitutional due process rights to be present at his restitution hearing, E.G. contends he was deprived of those rights when the hearing took place in his absence without adequate notice or a knowing, intelligent and voluntary waiver of his presence. He argues his absence cannot constitute a voluntary waiver of his constitutional rights.

The People concede E.G. has a statutory right to be present at the restitution hearing under Welfare and Institutions Code section 679,[1] but they point out this right is

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1 Welfare and Institutions Code section 679 provides in part: "A minor who is the subject of a juvenile court hearing . . . is entitled to be present at such hearing." (See also Cal. Rules of Court, rule 5.530(b)(1) [child is entitled to be present at all juvenile court proceedings]; Welf. & Inst. Code, § 730.6, subd. (h) ["A minor shall have the right to a hearing before a judge to dispute the determination of the amount of restitution"].)

subject to waiver that is shown to be knowing, intelligent and voluntary. They ask us to deem E.G. to have waived his right by voluntarily absenting himself from the proceeding, asserting his voluntary absence is established by the fact neither his parents nor his attorney indicated he wished to appear or objected to going forward with the hearing in his absence. The People also seem to acknowledge that a juvenile, like a criminal defendant, has a constitutional right to be present at all critical stages of the proceedings. However, they argue no constitutional violation occurred here because the contested restitution hearing in this case was not one where E.G.'s absence "might frustrate the fairness of the proceedings" or where his presence had a reasonably substantial relationship to the fullness of his opportunity to defend the charges.

"There is no doubt that the Due Process Clause is applicable in juvenile proceedings." (*Alfredo A. v. Superior Court* (1994) 6 Cal.4th 1212, 1225, citing *Schall v. Martin* (1984) 467 U.S. 253, 263; *In re Kevin S.* (2003) 113 Cal.App.4th 97, 107 [addressing the juvenile delinquency adjudication phase], in part citing *In re Gault* (1967) 387 U.S. 1, 31-34; *In re Jesse P.* (1992) 3 Cal.App.4th 1177, 1182; *In re Aaron N.* (1977) 70 Cal.App.3d 931, 941 [juvenile court proceedings that may result in "substantial loss of personal freedom are regarded as quasi-criminal in nature, and as a consequence the fundamental notions of due process and fairness must be strictly observed"].) However, the "precise impact of the Fourteenth Amendment due process clause in delinquency proceedings differs from that in the adult context." (*Kevin S.*, at p. 108; see *Alfredo A.*, at p. 1225; *Schall*, at p. 263.) Thus, not all constitutional protections associated with criminal defendants apply in the juvenile delinquency context. (*Alfredo A.*, at p. 1225

[quoting *Schall*, which enumerates applicable protections].) Nevertheless, as stated, the proceedings must " 'comport with the "fundamental fairness" demanded by the Due Process Clause.' " (*Alfredo A.*, at p. 1225, quoting *Schall*, at p. 263; *Kevin S.*, at p. 107.)

Applying these principles, at least one appellate court has held that the right to due process and fairness mandates that a minor be personally present – or knowingly and intelligently waive the right to be present – at proceedings that may "result in confinement or other sanctions, whether the state labels those proceedings 'criminal' or 'civil.' " (*In re Sidney M.* (1984) 162 Cal.App.3d 39, 47-48, quoting *Richard M. v. Superior Court* (1971) 4 Cal.3d 370, 375 [holding double jeopardy protections apply to adjudication phase of juvenile delinquency proceeding].) *Sidney M.* did not specifically refer to juvenile restitution hearings, and we have found no California case squarely addressing the question.

In the adult criminal offender context, the restitution hearing has been held to be "part and parcel" of the defendant's sentencing (*People v. Cain* (2000) 82 Cal.App.4th 81, 87; e.g., *People v. Rivera* (1989) 212 Cal.App.3d 1153, 1160-1161) and as such requires fewer due process protections than civil hearings or criminal hearings of guilt. (*People v. Giordono* (2007) 42 Cal.4th 644, 662, fn. 6 [enumerating cases but observing they were decided before the U.S. Supreme Court decided *Cunningham v. California* (2007) 549 U.S. 270].) For example, the Sixth Amendment rights to jury trial and to confront witnesses are not applicable to a restitution hearing; "a defendant's due process rights are protected if he is given notice of the amount of restitution sought and an opportunity to

contest that amount." (*Rivera*, at p. 1161; *People v. Cain*, at p. 86.[2]) An adult criminal offender's sentencing is nevertheless considered a critical stage of the criminal prosecution giving rise to the defendant's state and federal constitutional rights to be present. (U.S. Const., 6th & 14th Amends.; Cal. Const., art I, § 15; *People v. Rodriquez* (1998) 17 Cal.4th 253, 257 [criminal defendant has "statutory and constitutional rights to be present with counsel at sentencing and pronouncement of judgment, a critical stage of criminal prosecution"]; *People v. Waidla* (2000) 22 Cal.4th 690, 741-742; *People v. Wilen* (2008) 165 Cal.App.4th 270, 287.)

We acknowledge that juvenile court proceedings are not criminal proceedings (Welf. & Inst. Code, § 203) and that a victim restitution order is not a penal consequence. (*In re I.M.* (2005) 125 Cal.App.4th 1195, 1210; see also *People v. Harvest* (2000) 84 Cal.App.4th 641, 650 [holding that victim restitution does not constitute punishment for double jeopardy purposes]; but see *People v. Brown* (2007) 147 Cal.App.4th 1213, 1221-1223 [holding a substantial victim restitution award is punitive for purposes of Penal Code section 1192.5].) Nevertheless, for purposes of assessing a minor's right to be present, the People do not provide us with any reason to treat a juvenile's restitution hearing differently from an adult criminal defendant's sentencing hearing. We conclude a

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2 In *People v. Cain*, *supra*, 82 Cal.App.4th 81, the court acknowledged that a trial court will violate a defendant's due process right at a restitution hearing if the hearing procedures are fundamentally unfair. (*Id*. at p. 87.) However, it held that because a criminal defendant does not have a Sixth Amendment right of confrontation at the sentencing stage of a criminal prosecution, the defendant had no such right at the restitution hearing. (*Ibid*.)

juvenile restitution hearing is one in which due process and fundamental fairness requires the juvenile's presence unless his or her presence is effectively waived, including by the juvenile's voluntarily absence. Stated another way, a juvenile offender's presence bears a reasonably substantial relation to his or her opportunity to defend against the imposition of a restitution order. (E.g., *Kentucky v. Stincer* (1987) 482 U.S. 730, 745 [in the adult offender context, the Fourteenth Amendment guarantees the right to be present as a matter of due process at any "stage of the criminal proceeding that is critical to its outcome if [the defendant's] presence would contribute to the fairness of the procedure"]; accord, *People v. Concepcion* (2008) 45 Cal.4th 77, 81-82; *People v. Harris* (2008) 43 Cal.4th 1269, 1306; *People v. Wilen*, *supra*, 165 Cal.App.4th at p. 289.) E.G.'s restitution hearing did not present a question of law or involve routine procedural discussions. (*Concepcion*, at p. 82, fn. 6 [citing circumstances where right to be present is ordinarily not implicated].)

We decline to hold on this record that E.G. impliedly waived his right by voluntarily absenting himself from the proceedings. The record does not show he was made aware of the proceeding and given an opportunity to attend but refused, or that he otherwise had engaged in some wrongdoing causing his absence. (See *People v. Concepcion*, *supra*, 45 Cal.4th at p. 82.) E.G.'s counsel did not advise the court of E.G.'s wishes and gave no reason for his absence; she stated only that he was not present but in a residential treatment facility. Nor did the People demonstrate that E.G. expressly waived his right. Neither the transcript of the hearing nor the restitution order contains any finding that E.G. knowingly or intelligently waived his presence; indeed the court did

not conduct any pertinent inquiry on the issue. (See e.g., *In re Sidney M.*, *supra*, 162 Cal.App.3d at p. 48 [relevant circumstances in finding a knowing and intelligent waiver include the minor's age, intelligence, education, experience and ability to comprehend the meaning and effect of his or her acts].) Thus, the trial court deprived E.G. of due process of law in proceeding with the hearing in his absence.

The question remains whether the constitutional violation is harmless error.[3] (*Rushen v. Spain* (1983) 464 U.S. 114, 117-118; *People v. Cahill* (1993) 5 Cal.4th 478, 548 [denial of the right to personal presence is subject to harmless error analysis]; *People v. Medina* (1990) 51 Cal.3d 870, 902 [same]; *People v. El* (2002) 102 Cal.App.4th 1047, 1050.) Having concluded E.G.'s federal constitutional rights were implicated, we may affirm the judgment only if we are convinced beyond a reasonable doubt that the court's error in conducting the hearing in E.G.'s absence did not affect the hearing's outcome. (*People v. Robertson* (1989) 48 Cal.3d 18, 62; *People v. El*, at p. 1050; *Chapman v. California* (1967) 386 U.S. 18, 20-21.)

E.G. argues the constitutional violation cannot be considered harmless where the amount of restitution was factually contested; he maintains that that had he been present,

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3 There is no question the trial court violated E.G.'s statutory right to be present at his restitution hearing under Welfare and Institutions Code section 679. However, whether E.G.'s right arose from a state statute or the federal constitution implicates which harmless error standard applies. (*People v. Davis* (2005) 36 Cal.4th 510, 532-533; *People v. Wilen, supra*, 165 Cal.App.4th at p. 289 [*People v. Watson* (1956) 46 Cal.2d 818, 836 governs error under state statutes guaranteeing defendant's presence; reversal is required only if it is reasonably probable a result more favorable to the appealing party would have been reached in the absence of error].)

it is possible he would have testified that his punching of Lucero's vehicle did not inflict nearly $800 in damage. The People argue that even if E.G.'s constitutional due process rights were violated, the error was harmless because (1) E.G. was represented by counsel who was given advance notice of the restitution amount; (2) his counsel cross-examined the victim and was given an opportunity to present evidence on the issue; and (3) E.G.'s parents, who were interested in the matter to the same degree as their son, were present. They maintain there is nothing in the record to indicate E.G.'s presence would have affected the outcome of the hearing.

We are unconvinced with E.G.'s claim that he was prejudiced by having the restitution hearing take place in his absence. He does not attempt to explain how his defense could have substantially benefitted his defense or altered the outcome of the hearing. (*People v. Medina*, *supra*, 51 Cal.3d at pp. 902-903; *People v. Bradford* (1997) 15 Cal.4th 1229, 1358; *People v. Lang* (1989) 49 Cal.3d 991, 1027.) He merely states it is *possible* he would have testified that his punching of Lucero's vehicle did not inflict nearly $800 in damage. His argument raises only possibility and speculation, rather than a concrete showing of prejudice.

Further, in our view, E.G.'s testimony would have little weight if any; there is no indication E.G. had any particular knowledge of cars in general or car repairs, and thus the court could legitimately question E.G.'s competency as a foundational matter to testify about the monetary value of repairing the damage to Lucero's truck. E.G. had previously admitted he hit Lucero's vehicle "with his fist" and caused "little dents" resulting in more than $400 in damage. Lucero testified he witnessed E.G. hit his vehicle

– a new, undamaged 2006 Ford F150 truck – with his fist and kick at it several times, denting the sheet metal and causing the gas door to protrude. He testified he took the truck to Heritage Truck Painting & Auto Collision (Heritage) and received a repair estimate for $791.61, which was the amount he paid "out of pocket" to Heritage. Lucero, himself a service manager for a car dealership, acknowledged the estimate was high, but he stated that in addition to body work and paint to his left side panel, the repairs entailed replacing a bent gas filler neck. When E.G.'s counsel cross-examined Lucero about how a hand could leave such damage, Lucero explained E.G.'s hand left knuckle marks in the metal as well as damage to the gas door and fill tube, which he presumed was also caused by E.G.'s fist. E.G.'s counsel objected to the restitution amount as excessive, which would have been the import of the testimony E.G. claims he might have given had he been present.

An error of constitutional magnitude will be harmless only when beyond a reasonable doubt it does not contribute to the outcome. (E.g., *People v. Carter* (2005) 36 Cal.4th 1114, 1187.) We conclude under the circumstances that even under this more rigorous standard, E.G. was not prejudiced by his absence to warrant reversal.

II. *Apprendi/Blakely Error*

Based on the premise that restitution is punishment, E.G. contends the juvenile court's authority to order restitution must be limited to the amount of damages either admitted by him or proved to the court beyond a reasonable doubt. Accordingly, he argues that the restitution order exceeding $400 violated both *Apprendi* and *Blakely*, as

well as *United States v. Booker* (2005) 543 U.S. 220 and *Cunningham v. California* (2007) 549 U.S. 270. We disagree for several reasons.

First, E.G.'s claim fails on its premise. In *People v. Harvest*, *supra*, 84 Cal.App.4th 641, the court held that for double jeopardy purposes, victim restitution is not punishment but a civil remedy that a court is authorized to order in a criminal matter. (*Id*. at pp. 649-650.) The court applied the standards of *Hudson v. United States* (1997) 522 U.S. 93, 99: "The purpose of victim restitution is compensation, which does not involve an affirmative disability or restraint, and which has not historically been regarded as punishment. Victim restitution can, when developed in the context of a criminal sentencing, come into play only on a finding of scienter, but it does not necessarily require such – there is no barrier to the victim obtaining essentially the same relief, a civil judgment for money, outside the criminal process. The restitution statutes make no mention of scienter, and are separate from provisions specifying punishment for substantive offenses. [Citation.] Victim restitution does have an element of deterrence, but it is far less important than the goal and alternative purpose of providing compensation to a victim of crime. [Citation.] Because restitution is limited to actual and demonstrated economic loss, it can hardly be condemned as excessive to the stated purpose of compensation. [Citation.] Moreover, when these factors are considered in conjunction with the plain statutory language, there is nothing like 'the clearest proof' need to override the Legislature's patent intent that victim restitution is a civil remedy and not a criminal penalty." (*Harvest*, 84 Cal.App.4th at p. 650.) We agree with the *Harvest* court's reasoning on this point. Because victim restitution is not a "penalty for a crime,"

it does not fall within the holdings of *Apprendi* or *Blakely*. (See *Apprendi, supra*, 530 U.S. at p. 490.)

Furthermore, because the right to a jury determination of facts beyond a reasonable doubt only applies to a criminal penalty in excess of what a judge could otherwise impose based solely on the facts reflected in the jury's verdict or the defendant's admissions (*United States v. Booker* (2005) 543 U.S. 220, 232-233), E.G. here cannot show any constitutional violation even if we were to assume victim restitution is a criminal penalty. In the absence of an upper limit on restitution, E.G.'s reliance on *Blakely* and *Apprendi* is inapt. (Cf. *People v. Urbano* (2005) 128 Cal.App.4th 396, 405-406 [imposition of restitution fine within statutory range does not require jury findings beyond a reasonable doubt].)

Finally and more basically, a juvenile has no right to a jury trial in juvenile delinquency proceedings. (*Richard M. v. Superior Court, supra*, 4 Cal.3d at p. 376; *People v. Superior Court* (*Carl W.*) (1975) 15 Cal.3d 271, 274; *In re Alex U.* (2007) 158 Cal.App.4th 259, 264; *In re Christian G.* (2007) 153 Cal.App.4th 708, 713.) In a footnote, E.G. acknowledges this principle but maintains without explanation that it is limited to his juvenile adjudication and does not logically apply to the assessment of money damages. We are unconvinced. E.G. provides no reasoned explanation why a juvenile should be given greater rights in his or her restitution hearing than in the adjudication hearing.

III. *Petition for Writ of Habeas Corpus/Claim of Ineffective Assistance of Counsel*

Repeating his appellate contentions as to the trial court's due process violations relating to his restitution hearing, E.G. contends his counsel deprived him of constitutionally effective assistance by failing to conduct any independent investigation concerning the amount of restitution, failing to consult with him, and failing to ensure his presence at the restitution hearing.

E.G. bears the burden of showing first that his counsel's performance was deficient, falling below an objective standard of reasonableness under prevailing professional norms. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1052; *Strickland v. Washington* (1984) 466 U.S. 668, 687.) Second, he must establish prejudice: that absent counsel's errors, it is reasonably probable that the result of the proceeding would have been different. (*Hernandez*, at p. 1053; *Strickland*, 466 U.S. at p. 694.) A defendant must affirmatively demonstrate prejudice; it is not sufficient for the defendant to show the error had some "conceivable effect" on the outcome of the proceeding. (*People v. Ledesma* (1987) 43 Cal.3d 171, 217-218.) Courts may dispose of ineffective assistance claims on grounds of lack of prejudice without assessing the sufficiency of counsel's performance. (*In re Fields* (1990) 51 Cal.3d 1063, 1079, quoting *Strickland*, at p. 697; *People v. Hester* (2000) 22 Cal.4th 290, 297.) These standards apply in wardship proceedings. (*Johnny S. v. Superior Court* (1979) 90 Cal.App.3d 826, 828; *In re Julius B.* (1977) 68 Cal.App.3d 395, 401.)

In support of his petition, E.G. presents his own declaration establishing his absence at the hearing and stating he did not know about and was not notified by his

counsel or asked if he wanted to be present. He also presents a declaration from the owner of Heritage Truck Painting & Auto Collision, Carlos Osnaya, who averred "to the best of his knowledge" that while he had prepared the preliminary estimate, he had examined his business records and found no invoice indicating that the repair work was ever done at his business on Lucero's truck under that estimate.

We need not address E.G.'s contentions about his counsel's failure to ensure his presence, because we conclude for the reasons stated above (part I, *ante*) that any deficiency in his counsel's performance did not cause E.G. prejudice. Otherwise, E.G. maintains his counsel's performance fell below the above-referenced standards because she did not discover by investigation that Lucero's repairs were ostensibly not performed by Heritage and she could have asked to see a receipt, not simply a preliminary estimate, in order to impeach Lucero. But to the extent Osnaya purports to aver that Lucero did not in fact have repairs done at his shop, the declaration made "to the best of his knowledge" is incompetent. (See *Bowden v. Robinson* (1977) 67 Cal.App.3d 705, 719-720 [phrase "to the best of my knowledge" indicates something less than personal knowledge], but see, *Katelaris v. County of Orange* (2001) 92 Cal.App.4th 1211, 1215.) In our view, his declaration is just as deficient as one based on "information and belief," which this court has held is insufficient to satisfy personal knowledge requirements. (*Lopez v. University Partners* (1997) 54 Cal.App.4th 1117, 1124-1125.)

Setting that flaw aside, E.G. must establish "prejudice as a 'demonstrable reality,' not simply speculation as to the effect of the errors or omissions of counsel. [Citation.]

. . . The petitioner must demonstrate that counsel knew or should have known that further investigation was necessary, and must establish the nature and relevance of the evidence that counsel failed to present or discover." (*People v. Williams* (1988) 44 Cal.3d 883, 937.) "To establish that investigative omissions were constitutionally ineffective assistance, defendant must show at the outset that 'counsel knew or should have known' further investigation might turn up materially favorable evidence." (*Ibid*; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1244, superceded by statute on another ground as stated in *In re Steele* (2004) 32 Cal.4th 682, 691.) There is no indication in the petition, either by E.G.'s declaration, declaration of counsel or otherwise, that his counsel knew or should have known about the possibility that Lucero never actually repaired his truck or had any reason to investigate the matter before the hearing. Viewed from her perspective at the time of the challenged omission (*People v. Gonzalez*, at p. 1243), we cannot say counsel's performance was unreasonable and constitutionally ineffective.

Nor could we conclude E.G. has sufficiently demonstrated prejudice. "To determine whether prejudice has been established, we compare the actual [hearing] with the hypothetical [hearing] that would have taken place had counsel competently investigated and presented the . . . defense. [Citation.] This requires knowledge of all of the evidence that was presented at trial, not just the evidence that was presented at the habeas corpus hearing." (*In re Marquez* (1992) 1 Cal.4th 584, 604.) The deficiencies in Osnaya's declaration and the weakness of E.G.'s proffered testimony about the repair value of the damage he caused to Lucero's vehicle convinces us there is no reasonable

probability the court would have reached a different result had that evidence been before it at the restitution hearing.

DISPOSITION

The order is affirmed. The petition for writ of habeas corpus is denied.

O'ROURKE, J.

WE CONCUR:

McCONNELL, P. J.

NARES, J.